BANQUE NATIONALE DE PARIS

v.

TING KAI HOON

HIGH COURT SABAH & SARAWAK, SIBU
CLEMENT SKINNER J
[ORIGINATING SUMMONS NO: 24-12-2000]
21 AUGUST 2001

CIVIL PROCEDURE: *Reciprocal enforcement of judgments - Setting aside registration of foreign judgment - Whether interest should be accrued up to date of registration of judgment - Whether there was compliance with O. 67 r. 3(4) Rules of the High Court 1980 - Whether judgment contained penalty interest - Whether service of foreign writ improper - Whether registrar's certificate under O. 65 r. 2(6) RHC required - Whether judgment obtained in contravention of s. 4(1) and (2) Exchange Control Act 1953 and s. 4 of Banking and Financial Institutions Act 1989*

BANKING: *Banks and banking business - Meaning of "banking business" - Credit facilities offered by foreign bank - Whether constituted "banking business" within s. 2 Banking and Financial Institutions Act 1989 - Whether license required under s. 4*

The defendant applied to set aside the registration of a Singapore judgment ('the judgment') against him on the grounds that: (1) the plaintiff did not specify the interest accrued up to the date of registration of the judgment; (2) the plaintiff did not comply with O. 67 r. 3(4) Rules of the High Court 1980 ('RHC'); (3) the judgment was unenforceable because it contained penalty interest; (4) the service of the Singapore writ on him was improper and not in accordance with the laws of Malaysia; (5) the registrar's certificate under O. 65 r. 2(6) RHC was not furnished; (6) the plaintiff had, in offering credit facilities to the defendant, acted unlawfully in contravention of s. 4(1) and (2) of the Exchange Control Act 1953 ('ECA'); and (7) the plaintiff conducted unlicensed "banking business" in contravention of s. 4 of the Banking and Financial Institutions Act 1989 ('BAFIA').

Held:

[1] When the defendant complained about the uncertainty of the judgment because of the interest payable under it, he in fact sought to impeach it. The fact of registration did not transform the judgment into a Malaysian judgment so that the court might sit to enquire into its regularity or validity for certainty or the want of it. If the defendant wished to impeach the judgment for uncertainty, he should proceed to do so in Singapore. (pp 435 h & 437 f)

[2] The word "time for registration" under O. 67 r. 3(1)(d) Rules of the High Court 1980 is to be read as referring to the time of application for registration because it would be impossible for the plaintiff to have specified the interest accrued up to the date of registration of the judgment as it would not be able to anticipate or ascertain when the application would actually be heard. If that interpretation was wrong and the plaintiff was required to do so, then the plaintiff's omission should be treated as an irregularity under O. 2 r. 1(1) RHC so that the discretion vested in the court should be exercised in favour of curing the irregularity. (pp 438 i & 439 a & f)

[3] The plaintiff had sufficiently complied with O. 67 r. 3(4) RHC. Even if the affidavits filed on behalf of the plaintiff had omitted to state fully the matters required by O. 67 r. 3(4), such omission should be regarded as an irregularity curable under O. 2 r. 1(2) RHC. (pp 440 c-f)

[4] There was no merit in the defendant's contention that the judgment was unenforceable because it contained penalty interest. The defendant had failed to place any evidence before the court that the judgment included penalty interest. The allegation must, therefore, be regarded as a bare allegation. Further, the interest rate chargeable at 2% per annum on the sum due and unpaid or on the excess above the approved limit had been contractually agreed to and was not so exorbitant as to qualify as penalty interest. (pp 440 g-i & 441 a)

[5] There was no merit in the defendant's contention that service of the Singapore writ on him was improper and not in accordance with the laws of Malaysia. The service was effected by way of personal service by a process server of this High Court, a process well within the laws of this country. Further, it was a permitted method of service under O. 11 r. 3(8)(b) of the Singapore Rules of Court 1996 which was equivalent to O. 11 r. 5(8) of the RHC. In *United Overseas Bank Ltd v. Wong Hai Ong,* it was decided that service of originating process from Singapore and Brunei Darussalam can only be effected through that procedure or the procedure under O. 65 RHC. (pp 441 c-i)

[6] The defendant's insistence on the registrar's certificate under O. 65 r. 2(6) RHC was quite misplaced. Firstly, service of Singapore process in Malaysia is not restricted only through the formal procedure set out in O. 65 RHC. Where the alternative method of service through a judicial officer of the Malaysian courts is resorted to, the question of the registrar's certificate under O. 65 r. 2(6) RHC does not arise. Secondly, a reading of O. 65 r. 2(7) shows that the registrar's certificate given under para. (6) is meant for use in the foreign courts that service has been effected in Malaysia in accordance with the rules regulating service of process in

Malaysia. However, such certificate had no relevance to the facts herein as service had been effected under the alternative procedure and the defendant had not denied such service. (pp 442 a-c)

[7] There was no merit in the defendant's contention that the plaintiff was conducting unlicensed banking business contrary to s. 4 BAFIA. That was because to constitute 'banking business' the plaintiff was required to perform all three functions under s. 2 BAFIA. Legislature did not intend that the definition of banking business to be construed disjunctively and that to undertake any one type of business described therein is sufficient to constitute "banking business". (p 447 e-f)

[8] Even if it was shown that the plaintiff had breached the provisions of the ECA and BAFIA, the registration of the judgment should not be set aside for the reason that when the defendant accepted the credit facility, he was by its terms obliged to obtain all necessary permits or licenses to do so and in having failed to do so, the defendant could not set up or rely on his own wrongdoing to profit from it. The maxim *"ex turpi causa non oritur action"* would prevent him from doing so. (p 447 g-h)

[Application dismissed.]

Case(s) referred to:

Banque Nationale De Paris v. Wuan Swee May & Anor [2000] 4 CLJ 387 ***(foll)***

Bumiputra Merchant Banker Bhd v. The Melewar Corporation & Ors [1990] 2 CLJ 30; [1990] 1 CLJ (Rep) 693 ***(refd)***

Commerzbank (South East Asia) Ltd v. Dennis Ling Li Kuang [2000] 2 CLJ 57 ***(refd)***

Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625 ***(refd)***

Dr Woo Kin Chong v. Mary Ou Holdings Sdn Bhd [1997] 5 CLJ 164 ***(refd)***

Keppel Finance Ltd v. Phoon Ah Lek [1994] 3 MLJ 26 ***(refd)***

Re Tan Patrick, ex p Walter Peak Resorts Ltd [1994] 2 SLR 728 ***(refd)***

Realvest Properties Sdn Bhd v. Co-operative Central Bank Ltd (in receivership) [1996] 3 CLJ 823 ***(refd)***

Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310 ***(foll)***

The Development Bank of Singapore Ltd v. Furniture Industries Pte Ltd & Ors [1992] 2 CLJ 809; [1992] 2 CLJ (Rep) 364 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***

United Dominions Trust Ltd v. Kirkwood [1966] 1 All ER 968 ***(refd)***

United Overseas Bank Ltd v. Wong Hai Ong [1999] 5 CLJ 405 ***(refd)***

Vernes Asia Ltd v. Trendale Investment Pte Ltd & Anor [1988] 1 MLJ 357 ***(refd)***

Legislation referred to:
Banking and Financial Institutions Act 1989, ss. 2, 4
Exchange Control Act 1953, s. 4(1), (2)(a)
Reciprocal Enforce of Judgments Act 1958, s. 4(2)(a), (b), (d)
Rules of the High Court 1980, O. 2 r. 1(1), (2), O. 11 r. 5(8), O. 42 r. 12, O. 65 r. 2(5), (6), (7), O. 67 rr. 3(1)(d), (4), 4, 5(1)

Banking Act [Sing], s. 2
Bankruptcy Act [Sing], s. 3(1)(i)
Reciprocal Enforcement of Commonwealth Judgments Act [Sing], s. 3(3)(a)
Rules of Court 1996 [Sing], O. 11 r. 3(8)(b)
Rules of the Supreme Court [Sing], O. 42 r. 12
Supreme Court of Judicature Act 1969, s. 80

For the plaintiff - Jacqueline Tiong; M/s Yong & Wong Advocs
For the defendant - Robert Lau; M/s Stephen Robert & Wong

Reported by Usha Thiagarajah

JUDGMENT

Clement Skinner J:
On 27 July 1999, the judgment creditors, Banque Nationale De Paris (hereafter 'the plaintiff') obtained a judgment in default of appearance against Ting Kai Hoon (hereafter 'the defendant') in the High Court of the Republic of Singapore. That judgment is expressed in the following terms:

> IT IS THIS DAY ADJUDGED that the Defendant do pay the Plaintiffs:
>
> (a) the sum of MYR7,066,647.25 or its equivalent in Singapore dollars as at the date of judgment;
>
> (b) interest on the sum of MYR712,642.37 at the rate of 2% over prime plus 1% per annum from 4 September 1998 until payment;
>
> (c) interest on the sum of MYR6,044,296.44 at the rate of 2% over cost of funds plus 1% per annum from 4 September 1998 until payment; and
>
> (d) costs on an indemnity basis.

The plaintiff then applied to have that judgment registered in Malaysia pursuant to s. 4 of the Reciprocal Enforcement of Judgments Act 1958. The application was made to the High Court in Sabah and Sarawak at Sibu which, on 10 March 2000, granted the application and ordered that the judgment be registered as a judgment of the High Court in Sabah and Sarawak at Sibu. The defendant was granted liberty to apply to set aside the registration of the judgment, if he had grounds for doing so, within 14 days of the service on him of the notice of registration of the judgment.

The defendant has availed himself to that opportunity and this is the hearing of his application. The defendant initially relied upon six grounds for doing so. They were stated in these terms:

1. The said judgment is null and void for uncertainty and/or the same consists of penalty interest.

2. The plaintiff failed to specify the amount of interest that has become due under the Singapore law up to the time of registration.

3. The service of the writ of the High Court of the Republic of Singapore was improper and not in accordance with the laws of Malaysia.

4. The High Court of the Republic of Singapore did not have jurisdiction in the circumstances of the writ as the defendant never voluntarily submitted to the jurisdiction of the High Court of the Republic of Singapore and has never been resident in Singapore and never had an office or place of business in the Republic of Singapore.

5. The plaintiff who has breached its own representations and warranties is not entitled to seek any relief against the defendant.

6. The enforcement of the said judgment would be contrary to the public policy in Malaysia.

Before setting out the brief facts leading to this application, two points need to be made. The first is that although the defendant did not in his sixth ground spell out why it would be contrary to public policy in Malaysia to enforce the said judgment, he has in his affidavit of 1 September 2000 stated that in offering to him the credit facilities which I shall be shortly referring to, the plaintiff had acted unlawfully and in breach of s. 4(2) of the Exchange Control Act 1953 (hereafter 'the ECA'). The defendant in a second affidavit affirmed on 23 December 2000 further expanded on this complaint by saying that the plaintiff, by coming to Malaysia to offer credit facilities to residents in Malaysia, was carrying on banking business in breach of the Banking and Financial Institutions Act 1989 (hereafter 'BAFIA'). The second point is that at the hearing of this application, counsel for the defendant withdrew grounds four and five of the application, that is, the complaints raised on the jurisdiction of the Singapore High Court over the defendant in this matter and the alleged breaches of representations and warranties on the part of the plaintiff by giving him bad advice.

Now, to the brief facts. The plaintiff, a company in the banking business with a place of business at Tung Centre, 20 Collyer Quay, Singapore offered to the defendant, a businessman and resident of Sibu, Sarawak, credit facilities. The terms and conditions upon which those facilities were offered to and accepted by the defendant are set out in a letter of offer dated 6 August 1997. The purpose of the facility was for "share margin trading purposes" and the amount of the facility was US5,000,000 or its equivalent in other currencies.

After the action against the defendant was commenced in the High Court of the Republic of Singapore, the writ of summons together with a sealed copy of the order of the court dated 19 March 1999 (I assume of the Singapore High Court) and a copy of a request for service of documents out of Singapore were served personally on the defendant at Sibu, Sarawak, on 17 June 1999 by Encik Aini bin Hassan, the process server of the High Court in Sabah and Sarawak at Sibu. He has affirmed an affidavit of service to that effect which was filed in the Singapore action and exhibited as 'NWNR3' to the affidavit of Ng Wai Nam Rankie, affirmed on 16 October 2000 and filed on 11 December 2000 in these proceedings.

The defendant not having appeared in the Singapore action, judgment in default of appearance was entered against him on 27 July 1999 in the terms already set out above and which was on 10 March 2000 registered as a judgment of the High Court in Sabah and Sarawak. No attempt has been made by the defendant to set aside the judgment of the High Court of the Republic of Singapore.

I now turn to consider each of the grounds relied upon by the defendant to set aside the registration of the judgment.

Is the judgment null and void for uncertainty? It is the defendant's case that the judgment is uncertain because of the interest payable under it. According to him, by looking at the judgment there is no way of calculating the interest alleged to be due and the interest payable is not particularised in the judgment itself. The defendant also complains that the exact amount of interest at any period of time cannot be ascertained. It was therefore contended on behalf of the defendant that for those reasons the judgment had become void for uncertainty. In support the case of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd.* [1996] 1 CLJ 241 was cited.

The plaintiff has responded to the above contention in several ways. It first says that there is nothing unclear and uncertain about the principal sum due and owing by the defendant under the judgment. The amount is clearly stated in the judgment. The plaintiff then says the interest amount, even if not quantified in the judgment, cannot be said to be incapable of being ascertained.

It is merely a matter of calculation and the interest rate and the method as well as the period of calculation is provided for in the judgment. As such, it was submitted that the interest under the judgment is capable of being "ascertained".

It was next said by the plaintiff that the complaint of the defendant regarding the alleged uncertainty of the judgment should not be entertained by this court as the complaint is directed at a judgment of the Singapore High Court and not at a judgment of a Malaysian Court. The registration of the judgment as a judgment of the High Court in Sabah and Sarawak does not *per se* render or convert the judgment to be a Malaysian Judgment. And since a proper reading of s. 4(2) of the Reciprocal Enforcement of Judgments Act 1958 (hereafter 'the REJA') shows that it is only for the purposes of execution that the judgment obtained in countries which participated in the reciprocal enforcement of judgments and duly registered are to be treated as a judgment obtained in the registering country, it is the plaintiff's submission that the judgment continues to be a judgment of the Singapore Court which I should not enquire into for certainty in the manner suggested by the defendant.

Learned counsel for the plaintiff then went on to submit that in the event I formed the view that the interest element of the judgment was uncertain and unclear, I could, nevertheless, for the purposes of execution allow the plaintiff to execute the judgment for the amount owing as at the date of judgment and interest thereon at the statutory rate of 8% per annum as provided by O. 42 r. 12 Rules of the High Court 1980 (hereafter 'the RHC') in place of the interest portion as stated in the judgment. In support of such proposition, the plaintiff relied upon the case of *The Dvpt. Bank of Singapore Ltd. v. Furniture Industries Pte. Ltd. & 2 Ors.* [1992] 2 CLJ 809; [1992] 2 CLJ (Rep) 364. In that case the judgment entered in Singapore did not specify any post judgment interest. Upon its registration in Malaysia, the court allowed, after it was satisfied by way of affidavit evidence, the judgment to carry post judgment interest at 8% per annum since the post judgment interest is clearly implied under O. 42 r. 12 of the Singapore RSC read in conjunction with s. 80 of the Supreme Court of Judicature Act.

It is quite clear to me that when the defendant complains about the uncertainty of the judgment, he in effect seeks to impeach it. And as authority for the proposition that a judgment may be impeached for uncertainty, he relies on the decision of *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd. (supra).* In that case, the Federal Court set aside a default judgment, *inter alia*, on the ground that it was a nullity by reason of uncertainty as it contained ambiguities which could not be resolved by reference to a loan agreement. The default judgment had included an element of contractual interest at a fluctuating rate and when such interest was to run depended upon the absolute discretion of the respondent and so was clearly uncertain.

I must point out, however, that the Federal Court was there sitting in appeal against the decision of a Malaysian High Court and in arriving at its decision took the opportunity of examining the terms and conditions upon which the loan in that case was granted. Am I at liberty to do the same here and examine the terms upon which the credit facilities were offered to the defendant to enquire into the element of certainty of interest? It seems to me that if I were to do so, then instead of acting as a registering court sitting to give effect to comity of nations, I would in effect be sitting to review and question the regularity and validity of a judgment of the Singapore High Court, which on registration is for the purposes of enforcement to "be of the same force and effect ... as if the judgment had been a judgment" given by a Malaysian Court but nevertheless remains the judgment of the Singapore High Court.

Section 4(2)(a) and (d) of the REJA read as follows:

> (2) Subject to the provisions of this Act with respect to the setting aside of registration:
>
> (a) a registered judgment shall, for the purposes of execution, be of the same force and effect,
>
> (d) the registering court shall have the same control over the execution of a registered judgment,
>
> as if the judgment had been a judgment originally given in the registering court and entered on the date of registration.

Thus, a reading of s. 4(2)(a) shows that the fact of registration gives the Singapore judgment "the same force and effect ... as if the judgment had been a judgment" originally given in the registering court.

In the Singapore case of *Re Tan Patrick, ex p Walter Peak Resorts Ltd.* [1994] 2 SLR 728, Lai Kew Chai J considered similar phraseology found in s. 3(3)(a) of the Singapore Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 265) (hereafter 'the RECJA'). The context in which he did so was where a judgment creditor obtained a judgment in the High Court of New Zealand and registered it at the Singapore High Court under the provisions of the Singapore RECJA. A bankruptcy notice was latter issued and served on the debtor. The stipulated place of payment was an address in New Zealand. A question then arose whether the bankruptcy notice was issued "in accordance with the terms of the judgment" as required by s. 3(1)(i) of the Bankruptcy Act (Cap. 20) as the notice did not specify an address for payment in Singapore but New Zealand. The learned judge held that the failure to provide a Singapore address in the bankruptcy notice did not invalidate the same because for the bankruptcy notice to be served "in accordance with the judgment", it had to be in accordance with the New Zealand judgment, which

although registered as a judgment of a court in Singapore, nevertheless, remained a judgment of the New Zealand High Court. The reasoning of the learned judge is found at p. 733 of the judgment where after setting out the provisions of s. 3(3) of the Singapore RECJA in an earlier part of his judgment, he said:

> The fact of registration gives foreign judgment 'the same force and effect ... as if it had been a judgment originally obtained or entered upon the date of registration in the registering court' (s. 3(3)(a)). The New Zealand judgment is to be treated 'as if it had been a judgment originally obtained' in a local court. In the Australian case of *Re Abrahamson*, Neasey J considered similar phraseology within the context of the Service and Execution of Process Act 1901-1973. Under s. 2(2) of that Act, proceedings may be taken upon the certificate of registration 'as if the judgment had been a judgment' of the registering court. The learned judge held, at p. 216, that the phrase 'shows that the legislative assumption is that the judgment remains a judgment of the court out of which it was issued'.
>
> Similarly, s. 3(3)(a) of the RECJA does not transform a foreign judgment into a Singapore judgment. It simply provides for a foreign judgment to be treated 'as if' it had been a judgment of a court in Singapore. In my view, the New Zealand judgment remained a judgment of the court out of which it was issued. Notwithstanding the operation of s. 3(3)(a), the judgment in the present case remained a judgment of the High Court of New Zealand.

So too under s. 4(2)(a) of our REJA, the Singapore judgment is to be treated 'as if' it had been a judgment of a Malaysian Court but it is to be so treated for the purposes of execution and the control this court exercises over it is over its execution (s. 4(2)(b)). The fact of registration did not transform the judgment into a Malaysian judgment so that I may sit to enquire into its regularity or validity for certainty or the want of it. In my judgment, if the defendant wishes to impeach the judgment for uncertainty, he should proceed to do so in Singapore. With that, it is unnecessary to consider the other submissions by counsel for the plaintiff.

I next consider the second ground of the defendant, which is that the plaintiff had failed to specify the amount of interest that has become due under the Singapore judgment up to the time of registration of the judgment as well as the particular law of Singapore under which the same become due.

It is the complaint of the defendant that when the plaintiff sought registration of its judgment, it should have but did not specify, in the affidavit affirmed in support of such registration, the matters complained of above and so had failed to comply with the provisions of O. 67 r. 3(1)(d) and O. 67 r. 3(4) RHC.

Now, O. 67 r. 3(1)(d) in its material parts read:

> 3(1) An application for registration must be supported by an affidavit:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) specifying, where the application is made under the Act, the amount of the interest, if any, which under the law of the country of the original court has become due under the judgment up to the time of registration.

And O. 67 r. 3(4) reads:

> 3(4) In the case of an application under the Act, the affidavit must be accompanied by such other evidence with respect to the enforceability of the judgment by execution in the country of the original court, and of the law of that country under which any interest has become due under the judgment, as may be required having regard to the provisions of the Order under the Act extending that Act to that country.

It is the submission of the defendant that the failure of the plaintiff to comply with the above-mentioned rules of court was fatal to its application for registration as the word "must" found in both those rules indicate a mandatory requirement to comply therewith. In support, the cases of *The Dvpt Bank of Singapore Ltd. v. Furniture Industries Pte. Ltd. & 2 Ors.* [1992] 2 CLJ 809; [1992] 2 CLJ (Rep) 364; *Dr. Woo Kin Chong v. Mary Ou Holdings Sdn. Bhd.* [1997] 5 CLJ 164 and *Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors.* [1998] 1 CLJ 625 were cited. According to counsel for the defendant, 'as the law in this field ie, setting aside registration of a foreign judgment is a procedural law', the rules of court have to be complied with strictly (see, *Commerzbank (South East Asia) Ltd. v. Dennis Ling Li Kuang* [2000] 2 CLJ 57). According to counsel, since this case involves the registration of a foreign judgment under a statute, the court does not have such a wide discretion to cure any irregularity in procedure.

With regard to the defendant's complaint based on O. 67 r. 3(1)(d), the question is, did the affidavit of Henry ak. Joseph affirmed on 1 February 2000 in support of the application for registration fail to comply with O. 67 r. 3(1)(d)? I do not think it did. Order 67 r. 3(1)(d) does not say that the affidavit must specify the amount of interest which has become due up to the "date" of registration. The word used is "time" of registration. But what is the "time" of registration? Does it refer to the time of day on which registration takes place? I do not think it does because no order of court is extracted as having been granted at a particular time. In my judgment, the word "time" is to be

read as referring to the time of application for registration because, as correctly pointed out by counsel for the plaintiff, it would be impossible for the plaintiff to have specified the interest accrued up to the date of registration of the judgment in the affidavit of Henry ak. Joseph for the simple reason that it is not able to anticipate or ascertain when the application will actually be heard. At best the plaintiff is able to decide the date on which it will file its application and provide the required particulars up to that date. This is what has happened here because when the plaintiff filed its application on 1 February 2000, attached as exh. 'HJ3' to the affidavit of Henry Joseph is a copy of the plaintiff's generated account which does specify the amount of interest due and owing by the defendant as at 1 February 2000.

Counsel for the defendant has submitted that it was possible for the plaintiff to supply the information required by O. 67 r. 3(1)(d) as at the date of registration because when its application for registration was fixed for hearing, that date became ascertained and a supplementary affidavit should have been filed supplying the particulars up to the date of hearing. I regret I cannot subscribe to that view. What if the application was not heard on the given date and adjourned to a few days or a week later and thereafter also not heard? Is the plaintiff expected then to keep on filing supplementary affidavits as suggested by the counsel for the defendant? To expect so would, in my view, be reading O. 67 r. 3(1)(d) in such an unreasonable way so as to cause inconvenience rather than to facilitate the speedy and efficient administration of justice.

If I am wrong in my interpretation of O. 67 r. 3(1)(d) and the plaintiff is required to specify the amount of interest that has become due under the judgment up to the date of registration, then I would treat the plaintiff's omission to do so as an irregularity under the provisions of O. 2 r. 1(1) so that the discretion vested in the court should be exercised in favour of curing the irregularity for the following reasons: First, the plaintiff has by providing the information in exh. 'HJ3' of Henry ak. Joseph's affidavit of 1 February 2000 made substantial compliance with the rule. Second, I agree with counsel for the plaintiff that there is no requirement that the court order evidencing the registration has to specify the amount of interest payable up to the date of the registration. Order 67 r. 5(1) states, *inter alia*, that the order must be in Form 145. A reading of Form 145 shows that interest due under the judgment up to the date of registration need not be specified. Third, while counsel for the defendant has referred to me those several cases earlier mentioned where the court in those cases took a view that the rules of court must be strictly complied with; and, while I agree that the rules of court must *prima facie* be complied with, each case must be decided on its own particular facts and I find that this is not a case in which the defendant has been able

to demonstrate in any way that he has been prejudiced by the omission complained of. Not a word has been said by the defendant that he wishes to pay any part of the principal or interest due under the judgment but is unable to do so because of the omission complained of. I prefer, instead, to adopt the approach in *Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd.* [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310 where the Supreme Court held that the failure of the defendant to state that it had a good cause of action against the intended third party in its affidavit in support of its application for leave to issue a third party notice out of jurisdiction is an irregularity which could be cured.

With regard to the defendant's complaint that the plaintiff had failed to comply with O. 67 r. 4, I regret I do not agree with that submission. The supplementary affidavit of Gan Kam Yuin, an advocate and solicitor of the Supreme Court of the Republic of Singapore and a person qualified to practise Singapore law states that the judgment obtained by the plaintiff in Suit No. 389 of 1999 in Singapore on 27 July 1999 is enforceable in the Republic of Singapore under the laws of Singapore. In my opinion, such statement sufficiently complies with the provisions of O. 67 r. 3(4). I also did not find the case of *The Dvpt Bank of Singapore Ltd. v. Furniture Industries Pte. Ltd. (supra)* was of assistance to the defendant because in that case the Singapore judgment did not carry any post judgment interest. However, when it was to be registered in Malaysia, the judgment creditor sought post judgment interest to be included in the judgment to be registered. In those circumstances, the learned judge there insisted on being provided with evidence of the entitlement to such interest under the laws of Singapore. In our case, the judgment already carried post judgment interest. In any event, even if it can be said that the affidavits filed on behalf of the plaintiff had omitted to state fully the matters required by O. 67 r. 3(4), I would for the same reasons given earlier when discussing O. 67 r. 3(1)(d) regard such omission as an irregularity which can be cured under the provisions of O. 2 r. 1(2).

With regard to the defendant's contention that the judgment is unenforceable as it contains penalty interest, I regret I find no merit in this contention. I agree with the plaintiff that the defendant has failed to place any evidence before the court that the judgment included penalty interest or that the plaintiff has charged penalty interest. The allegation must, therefore, be regarded as a bare allegation. I should point out, nevertheless, that counsel for the plaintiff has drawn attention to the fact that under the terms of the credit facility offered to the defendant, the plaintiff had the right to charge interest from the time of default until the date of full payment. The defendant has never denied signing and accepting the terms on which the facility was offered. So the interest rate chargeable has been contractually agreed to. In any event, I do

not consider the contractually agreed default interest of 2% per annum charged by the plaintiff here on, *inter alia*, only the sum due and unpaid or the excess above the approved limit as so exorbitant to qualify as penalty interest (see, *Bumiputra Merchant Banker Bhd. v. The Melewar Corporation & 2 Ors.* [1990] 2 CLJ 30; [1990] 1 CLJ (Rep) and *Realvest Properties Sdn. Bhd. v. Co-operative Central Bank Ltd. (In Receivership)* [1996] 3 CLJ 823).

The third ground relied upon by the defendant to set aside registration of the judgment was that service on him of the Singapore writ was improper and not in accordance with the laws of Malaysia. It was said that the plaintiff has failed to comply with O. 65 r. 2(5) RHC as it had failed to produce the 'certificate' to prove compliance with the order. I think the 'certificate' the defendant refers to is that of the registrar mentioned in sub-r. (6) not (5). I regret I find no merit in this complaint. Service of the Singapore writ was effected on the defendant by way of personal service by a process server of this High Court. An affidavit of such service by Aini bin Hassan has been exhibited in these proceedings. The defendant does not complain that there was anything wrong or improper about the service upon him in the manner described in the affidavit of service of Aini bin Hassan. And I do not think he can raise any complaint about it as service was effected through a judicial officer of this court, a process well within the laws of this country.

The plaintiff also points out that the process of effecting service of the Singapore writ through a judicial officer of this court is a permitted method of service under O. 11 r. 3(8)(b) of the Singapore Rules of Court 1996. In instances where the defendant is in Malaysia or Brunei Darussalam, that rule allows the Singapore originating process to be "sent by post or otherwise by the registrar to the magistrate, registrar or other appropriate officer of any court exercising civil jurisdiction in the area in which the person to be served is said to be or to be carrying on business for service oil the defendant, and if it is returned with an endorsement of service and with an affidavit of such service, it shall be deemed to have been duly served."

I should point out that O. 11 r. 3(8)(b) of the Singapore rules is equivalent to O. 11 r. 5(8) of our RHC, whereby service of the originating process of Malaysian Courts may be effected in Singapore and Brunei Darussalam through the same process. I therefore cannot see how it can be said that in giving effect to reciprocating provisions found in the rules of court of Malaysia and Singapore in regard to the service of originating process in each jurisdiction, the service of the writ on the defendant in accordance with those provisions is improper and contrary to the laws of Malaysia. In fact, in a recent judgment Ian HC Chin J decided that service of originating process from Singapore and Brunei Darussalam can only be effected through that procedure or the procedure under O. 65 RHC. (See, *United Overseas Bank Ltd. v. Wong Hai Ong* [1999] 5 CLJ 405).

With respect, I also find the defendant's insistence on the registrar's certificate under O. 65 r. 2(6) RHC is quite misplaced. In the first place, service of Singapore process in Malaysia is not restricted only through the formal procedure set out in O. 65 RHC. Where the alternative method of service through a judicial officer of the Malaysian Courts is resorted to, the question of the registrar's certificate under O. 65 r. 2(6) just does not arise. In the second place, a reading of O. 65 r. 2(7) shows that the registrar's certificate "given under para. (6) shall be sealed with the seal of the High Court for use out of the jurisdiction and shall be sent to the Minister." The certificate is, therefore, meant for use in the foreign courts to satisfy them that service has been effected in Malaysia in accordance with the rules regulating service of process in Malaysia. But as I have already said, such certificate can have no relevance to the facts before me where service has been effected under the alternative procedure and the defendant has not denied such service.

The sixth ground relied upon by the defendant to set aside registration of the judgment was that it would be contrary to public policy in Malaysia to enforce and give effect to the judgment. It was said that to do so would offend Malaysian public policy because the plaintiff had, in offering credit facilities to the defendant, acted unlawfully in that: (a) the plaintiff had done so in contravention of s. 4(1) and (2) of the ECA; and (b) the plaintiff had in doing so carried on banking business in Malaysia without the necessary licence under s. 4 of BAFIA.

I will take the complaint about the plaintiff's breach of the Exchange Control Act 1953, first. To put the defendant's complaint into its proper context, s. 4(1) and (2) of the ECA are now set out:

> (1) Except with the permission of the Controller, no person, other than an authorised dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer.
>
> (2) Except with the permission of the Controller, no person resident in the scheduled territories, other than an authorised dealer, shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, buying or borrowing any gold or foreign currency from, or selling or lending any gold or foreign currency to, any person outside Malaysia.

It is the defendant's case that the plaintiff had failed to obtain the permission of the Controller to lend him foreign currency. He is a resident of Malaysia, the agreement was entered into in Malaysia, the money was remitted into Malaysia and used to finance the trading in Malaysian listed shares and the plaintiff is now demanding payment in Malaysia.

I regret that again, I find no merit in this complaint. In my judgment, what s. 4(1) of the ECA prohibits is the actual doing of the acts specified therein in Malaysia, that is, the buying, selling, borrowing or lending of gold or foreign currency in Malaysia. A similar view was taken of s. 4(1) ECA by VC George J (as he then was) in *Keppel Finance Ltd. v. Phoon Ah Lek* [1994] 3 MLJ 26 (at p. 37, para. B). There is no evidence that the lending of foreign currency to the defendant took place in Malaysia. The plaintiff is a foreign incorporated company with a place of business at Tung Centre, 20 Collyer Quay, Singapore. There is no evidence before me that it has a branch or any office in Malaysia. According to para. 25(b) of Ng Wai Nam Rankie's affidavit of 16 October 2000, the defendant opened an account with the plaintiff in August 1997. I take that to have been an account opened, operated and maintained outside Malaysia. The defendant himself, in para. 7(d) of his affidavit of 1 September 2000 says that the remission of funds was from Singapore to Malaysia. But the remission of those funds was to pay the defendant's obligations to a third party ie, Sarawak Securities Sdn. Bhd. The loan or facility was, therefore, drawn, disbursed and utilised in Singapore by the defendant but remitted to Malaysia in payment of his debt at Sarawak Securities Sdn. Bhd.

With regard to s. 4(2) of the ECA, the provisions of that section have been considered recently in *Banque Nationale De Paris v. Wuan Swee May & Anor.* [2000] 4 CLJ 387. The bank who was the plaintiff in that case is the same plaintiff here. What the plaintiff is alleged to have done in that case is similar to what the plaintiff here is also alleged to have done, namely:

(a) the *modus operandi* of the plaintiff are similar in that the plaintiff's officers will come to Malaysia to solicit for business;

(b) the facilities were offered in foreign currency;

(c) the personnel for the plaintiff who came to Malaysia is the same person – one Ms. Rita Chou;

(d) the security for loans in both cases were deposit of stocks and shares with the plaintiff's nominees in Singapore.

In that case, it was argued that the act of the plaintiff in soliciting and offering facilities in foreign currency were acts which involved or were in association with or were preparatory to a person resident in Malaysia borrowing foreign currencies from a person outside Malaysia in contravention of s. 4(2) of the ECA. His Lordship Abdul Hamid Mohamad J (as he then was) after considering the words of s. 4(2) ECA held that the person prohibited by that sub-section from doing the acts mentioned therein must be a person resident in Malaysia. In other words, s. 4(2) did not apply to non-residents.

This is what his Lordship said at p. 393 of his judgment:

> What is complained about here is the act of the plaintiff, the non-resident lender, not the act of the resident borrower. The non-resident lender is said to do an act which involves, is in association with or is preparatory to the resident borrower borrowing foreign currency from the non-resident lender.
>
> Is that one of the situations envisaged by that subsection?
>
> That subsection reads, *inter alia*:
>
> > ... no person resident in the scheduled territories ... shall, in Malaysia, do any act ...
>
> The 'person' referred to by that subsection is a 'person resident' in Malaysia. Clearly the plaintiff is not such a person.
>
> That subsection further provides that the resident is prohibited 'from ... borrowing ... foreign currency from or ... lending ... foreign currency to, any person outside Malaysia'. Again, the plaintiff did not borrow from or lend to a person outside Malaysia. Instead, the plaintiff was outside Malaysia and the defendant was in Malaysia.
>
> So, clearly the situations envisaged in that subsection are not applicable to the facts of this case.

So too here, the defendant's complaints are directed at what the plaintiff is alleged to have done but the plaintiff is not resident in the scheduled territories and, therefore, cannot be said to have contravened s. 4(2) ECA.

I finally deal with the complaint of the defendant that the plaintiff had, by its officers' action in coming to Malaysia to solicit business and offering credit facilities to not only himself but also to several other businessmen in Sarawak as well, actively carried on the business of banking in Malaysia without the necessary licence under s. 4 of BAFIA. The defendant identified those other businessmen in Sarawak who had obtained credit facilities from the plaintiff as being one Richard Lee Chiong Woo, one Dennis Ling Li Kuang and one Wong Hai Ong.

To begin with, in *Banque Nationale De Paris v. Wuan Swee May & Anor. (supra)* the same issue was raised. Abdul Hamid Mohamad J did not think the plaintiff there (who is the same plaintiff here) in doing almost exactly what the plaintiff here is also alleged to have done, was carrying on banking business in Malaysia. This is what his Lordship said at p. 390 of his judgment:

> The issue is whether the plaintiff carried on the business of banking in Malaysia.

The plaintiff has neither branch nor office in Malaysia. The facts that appear to be in support of the contention that the plaintiff carried on business in Malaysia are, first Ms. Rita Chou, the plaintiff's Vice President, Private Banking Division approached the second defendant to open an offshore account with the plaintiff's Singapore Branch. Secondly, the necessary documents for the opening of the account and for the loan were sent to Kuala Lumpur for signature by the defendants and were signed by them in Kuala Lumpur. Thirdly, part of the securities were deposited with the plaintiff's nominee in Kuala Lumpur.

On those facts, can it be said that the plaintiff was carrying on the business of banking in Malaysia? I do not think so. Surely, it takes more than that to carry on the business of banking in Malaysia.

In my judgment the plaintiff had not breached the provision of BAFIA.

So, what does it take to carry on the business of banking in Malaysia?

In so far as it is relevant to the issue at hand, s. 4 of BAFIA provides:

No person shall carry on:

(a) banking, finance company, merchant banking, or discount house business, unless it is a public company; or

(b) money-broking business, unless it is a corporation,

and holds a valid licence granted under section 6(4) to carry on such business.

The term "banking business" is defined in s. 2 of BAFIA as:

Banking business means:

(a) the business of:

(i) receiving deposits on current account, deposit account, savings account or other similar account;

(ii) paying or collecting cheques drawn by or paid in by customers; and

(iii) provision of finance; or

(b) such other business as the Bank, with the approval of the Minister, may prescribe;

So, the legislature has defined in s. 2 the types of business that constitutes banking business and have grouped them into three broad categories of functions.

With reference to those functions, it was the contention of counsel for the defendant that so long as the plaintiff performed any one of them, it must be held to have carried on banking business. Counsel for the plaintiff takes an opposite view. It was her submission that to constitute carrying on business of banking within the meaning of s. 2 of BAFIA, a person must perform all the three functions mentioned in s. 2 of BAFIA.

Counsel for the defendant has not referred me to any authorities in support of his contention which, in effect, requires me to construe disjunctively the functions set out in paras. (i), (ii) and (iii) of sub-s. (a) of s. 2 of BAFIA which defines 'banking business'. In other words, the subsection should be read as if the word 'or' appears after each paragraph.

Counsel for the plaintiff has drawn my attention to the case of *Vernes Asia Ltd. v. Trendale Investment Pte. Ltd. & Anor.* [1988] 1 MLJ 357 where the very issue posed before this court came up for consideration there. In that case the plaintiff, a deposit-taking company incorporated in Hong Kong with no office or place of business in Singapore, gave a loan to the first defendant, a property developer in Singapore to purchase certain property. The plaintiff also took as security, a mortgage over the property in Singapore. It was alleged that the plaintiff was conducting unlicensed banking business in Singapore, and accordingly that the loan agreement concluded with the first defendant was illegal and unenforceable. To resolve that question, the court had to construe the definition of "banking business" in s. 2 of the Singapore Banking Act (which is similar to s. 2 of our BAFIA). In deciding that the transaction was not illegal, Grimberg JC held that to conduct banking business, the plaintiff would need to perform all the functions mentioned and not just some or one of them because in the opinion of the learned judge, "it cannot be said that a proper construction of the definition requires it to be read as though the word "or" appears after each of the types of business described in the definition".

What is useful about the decision in *Vernes Asia Ltd*. is that, as an aid to construing the definition of 'banking business' in the Singapore Act, the learned judge there relied upon what Lord Denning MR had described as the characteristics usually found in a bankers' business in the case of *United Dominions Trust Ltd. v. Kirkwood* [1966] 1 All ER 968. In that case the plaintiff sought to establish that they were "*bona fide* carrying on the business of banking" so that they were not to be considered as unregistered moneylenders under the Moneylenders Act 1900 of England. Although English statutes defined a banker as a person who carried on the business of banking, there was no statutory definition of banking. It therefore became necessary for the court to find out the usual characteristics which went to make up the

business of banking. To do so, Lord Denning MR undertook a historical analysis, going back to the eighteenth century before cheques came into common use until modern times and then concluded at p. 975 that:

> There are, therefore, two characteristics usually found in bankers today: (i) they accept money from, and collect cheques for, their customers and place them to their credit; (ii) they honour cheques or orders drawn on them by their customers when presented for payment and debit their customers accordingly. These two characteristics carry with them also a third, namely, (iii) they keep current accounts, or something of that nature, in their books in which the credits and debits are entered.
>
> Those three characteristics are much the same as those stated in *Paget's Law of Banking* (6th Edn.) (1961), p. 8:
>
> > No-one and nobody, corporate or otherwise, can be a 'banker' who does not (i) take current accounts; (ii) pay cheques drawn on himself; (iii) collect cheques for his customers.

It will thus be seen that what has been statutorily defined as "banking business" in s. 2 of BAFIA is not very different from a definition of the expression in the *United Dominion Trust Ltd.* case and although the provision of finance is an additional characteristic in our definition, I do not see that in having defined "banking business" in the way it has, it can be said that Parliament had intended to alter the essential characteristics that go to making up that expression as defined in the *United Dominions Trust* case. In fact, it is my view that by retaining in the definition of "banking business" those characteristics, the legislature did not intend the definition to be construed disjunctively so that to undertake any one type of business described therein, such as for example providing finance is sufficient to constitute the carrying on of banking business.

With the conclusions I have arrived at on the complaints raised by the defendant under the ECA and BAFIA, it will not be necessary for me to deal with the submissions made on behalf of the plaintiff to the effect that even if it is shown that the plaintiff had breached the provisions of the ECA and BAFIA, the registration of the judgment should not be set aside for the reason that when the defendant accepted the credit facility, he was by its terms obliged to obtain all necessary permits, consents or licences to do so and in having failed to do so, the defendant cannot set up or rely on his own wrongdoing to profit from it: the maxim *"ex turpi causa non oritur action"* would prevent him from doing so.

In the result, I dismiss the defendant's application with costs.